

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of

Ifonoclast, Inc. d/b/a Phonevite

File No.: EB-TCD-12-00002528

CITATION AND ORDER

PRERECORDED MESSAGE VIOLATIONS

Adopted: May 4, 2015**Released: May 4, 2015**

By the Chief, Telecommunications Consumers Division, Enforcement Bureau:

I. NOTICE OF CITATION

1. This **CITATION AND ORDER** (Citation), notifies Ifonoclast, Inc., d/b/a Phonevite (Phonevite) that it failed to comply with the provisions of the Communications Act of 1934, as amended (Act) and Commission's rules (Rules) that prohibit making calls to cell phones using autodialers or artificial or prerecorded messages (robocalls) absent an emergency purpose or prior express consent. We therefore direct Phonevite to take immediate steps to comply with FCC Rules and the Telephone Consumer Protection Act's (TCPA) prohibitions against unlawful robocalls. If Phonevite fails to comply with these laws, it may be liable for significant penalties, including fines of up to \$16,000 per call.

2. **Notice of Duty to Comply with the Law:** We issue this Citation pursuant to Section 503(b)(5) of the Act, which states that the Commission may not impose monetary forfeitures against non-regulatees who violate Commission rules or the Act unless and until: (a) the Commission issues a citation to the violator; (b) the Commission provides the violator a reasonable opportunity to respond; and (c) the violator subsequently engages in conduct described in the citation.¹ Accordingly, Phonevite is hereby on notice that it must comply with Section 227 of the Act and Section 64.1200 of the Commission's Rules.² If Phonevite subsequently engages in any conduct of the type this Citation describes — and specifically any violation of the TCPA and accompanying Rules — Phonevite may be subject to civil penalties, including but not limited to, substantial monetary forfeitures. In assessing such forfeitures, the Commission may consider both the conduct that led to this Citation and the conduct following it.³

II. BACKGROUND

3. Robocalls made to consumers' cell phones without consent or in the absence of an emergency are illegal. For more than two decades, Congress and the Commission have sought to protect consumers from harassing, intrusive, and unwanted robocalls to pagers, cell phones, smart phones, and other mobile devices. In 1991, Congress passed the TCPA and outlawed robocalls to mobile phones except in two limited circumstances: the two specific exceptions are calls made (1) for emergency purposes or (2) with the prior express consent of the called party. The Commission adopted regulations

¹ See 47 U.S.C. § 503(b)(5).

² 47 U.S.C. § 227, 47 C.F.R. § 64.1200, 47 C.F.R. § 64.1601(e).

³ See S. Rep. No. 95-580, 95th Cong., 1st Sess. at 9 (1977) (If a person or entity that has been issued a citation by the Commission thereafter engages in the conduct for which the citation of violation was sent, the subsequent notice of apparent liability "would attach not only for the conduct occurring subsequently *but also for the conduct for which the citation was originally sent.*") (emphasis added).

implementing the TCPA in Section 64.1200 of the Rules,⁴ and enforces the TCPA by conducting investigations and taking enforcement actions against violators.⁵

4. Phonevite offers a robocalling service whereby the Company's clients pay the Company to make artificial or prerecorded voice calls to telephone numbers of the clients' choosing.⁶ The Company markets its services on the Internet at www.phonevite.com, a website it owns, operates, and controls.⁷ Phonevite's services allow clients to record and upload messages for Phonevite to send at a scheduled time. The Company offers various pricing plans, including a free service that allows clients to send two free messages to a maximum of 25 numbers within a 30-day period, as well as a "premium" service that allows clients to send messages to a maximum of 30,000 numbers as many times as they want⁸ for a fee charged per each successful call.⁹ For messages provided under the free service, Phonevite adds a "short, non-intrusive blurb about the Phonevite service (e.g. 'This free call was powered by Phonevite . . .')" at the end of the message.¹⁰ In addition, the website states that at the end of every live call and on the web (i.e., Phonevite's website), recipients have the option to opt out of receiving calls from the Phonevite service.¹¹

5. According to the Phonevite website, organizations and individuals can use Phonevite services for a variety of purposes, including, among other things, to plan parties, update family while overseas, send reminders of events, provide weather-related cancellations, send school updates, remind colleagues of a conference call or meeting, announce company news, broadcast emergency alerts, provide appointment reminders, and confirm orders and product delivery status.¹² In addition, the website states that "[t]housands of schools, churches, municipalities, non-profits and other similar organizations are using Phonevite to broadcast emergency alerts, event reminders and time-critical notifications over the phone."¹³ The Company's "Terms of Service" prohibit clients from using or attempting to use the Phonevite services in connection with any advertising or messages that are "promotional in nature."¹⁴ Similarly, the Terms of Service prohibit clients from using the Phonevite services to send messages to "emergency lines, to any health care facility or similar establishment, to numbers assigned to radio common carrier services or to any service for which the called party is charged for the call" and may not send "unsolicited messages, including promotions and/or advertising of products or services unless you

⁴ See 47 C.F.R. § 64.1200. See also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 7 FCC Rcd 8752 (1992).

⁵ See, e.g., *Dialing Servs., LLC*, Notice of Apparent Liability for Forfeiture, 29 FCC Rcd 5537 (2014) (*Dialing Services*).

⁶ See Phonevite Website, Help Center, Features, <https://www.phonevite.com/help/features.php> (last visited Apr. 2, 2015).

⁷ See Letter from William E. Raney, Copilevitz & Canter, LLC, to Kristi Thompson, Deputy Division Chief, and William Beckwith, Attorney Advisor, Telecommunications Consumers Division, FCC Enforcement Bureau at 1 (Mar. 13, 2013) (on file in EB-TCD-00002528) (Phonevite March 13 Response).

⁸ See Phonevite Website, Free Service, <https://www.phonevite.com/help/freevspremium.php> (last visited Apr. 2, 2015).

⁹ See Phonevite Website, Premium Service, Premium Service Benefits, <https://www.phonevite.com/help/priceplan.php> (last visited Apr. 2, 2015).

¹⁰ See Phonevite Website, Free Service, <https://www.phonevite.com/help/freevspremium.php> (last visited Apr. 2, 2015).

¹¹ See Phonevite Website, Homepage, Why Phonevite is Safe, <https://www.phonevite.com/> (last visited Apr. 2, 2015).

¹² See Phonevite Website, When to Use, <https://www.phonevite.com/help/when.php> (last visited Apr. 2, 2015).

¹³ Phonevite Website, Homepage, About Us, <https://www.phonevite.com/company/> (last visited Apr. 2, 2015).

¹⁴ Phonevite Website, Homepage, Terms of Service, <https://www.phonevite.com/company/ts.php> (last visited Apr. 2, 2015).

have consent to do so.”¹⁵ Clients must agree to the Terms of Service before they can create an account and use the services.¹⁶

6. On February 8, 2013, the Telecommunications Consumers Division (TCD) of the FCC’s Enforcement Bureau sent the Company a letter of inquiry (LOI) directing the Company to, among other things, provide documents and information relating to artificial or prerecorded voice message calls made by the Company during the period September 1, 2012, through February 8, 2013. On March 13, 2013, the Company filed a response to the LOI.¹⁷ The Company filed additional responses to the LOI on April 12, 2013,¹⁸ and June 30, 2013.¹⁹

III. APPLICABLE LAW AND VIOLATIONS

7. Section 227(b)(1)(A)(iii) of the Communications Act and Section 64.1200(a)(1)(iii) of the Commission’s rules prohibit prerecorded voice messages and autodialed calls (including autodialed live calls and prerecorded or artificial voice messages) to cell phones and other mobile services, such as paging systems unless certain conditions are met. Specifically, the Act makes it unlawful “for any person . . . to make any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.”²⁰ The Commission implemented the statutory prohibition in its rules without substantive change.²¹ The prohibitions in the Act and the FCC rules are subject to only two exceptions: (1) calls made for emergency purposes and (2) calls made with the prior express consent of the called party.²² Callers contending that they have the prior express consent to make prerecorded voice or autodialed calls to cell phones or other mobile service numbers have the burden of proof to show that they obtained such consent.²³

8. TCD staff reviewed over 2,300 sound files of prerecorded message calls made by Phonevite in November 2012. The majority of these calls were various types of notifications, including updates from schools, churches, sports teams, and civic groups, and other groups, as well as invitations

¹⁵ *Id.* (last visited Apr. 2, 2015).

¹⁶ See Phonevite Website, Signup Now, <https://www.phonevite.com/signup/> (last visited Apr. 2, 2015).

¹⁷ See Phonevite March 13 Response.

¹⁸ See Letter and USB Drive from John Nahm, CEO, Ifonoclast, Inc. d/b/a Phonevite, to Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (April 12, 2013) (on file in EB-TCD-12-00002528).

¹⁹ See Letter and USB Drive from John Nahm, CEO, Ifonoclast, Inc. d/b/a Phonevite, to Kristi Thompson, Deputy Division Chief, Telecommunications Consumers Division, FCC Enforcement Bureau (June 30, 2013) (on file in EB-TCD-12-00002528) (June 30 Response).

²⁰ 47 U.S.C. § 227(b)(1), (b)(1)(A)(iii). See also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 18 FCC Rcd 14014, 14115, para. 165 (2003) (discussing unlawful telemarketing calls to wireless numbers and explaining that statutory prohibition “encompasses both voice calls and text calls to wireless numbers including, for example, short message service (SMS) calls”).

²¹ 47 C.F.R. § 64.1200(a)(1)(iii) (making it unlawful “to initiate any call . . . using any automatic telephone dialing system or an artificial or prerecorded voice . . . to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call.”). As explained above, we interpret the term “initiate” in the Rule as intended to have the same meaning as “make” as used in Section 227(b)(1)(A) of the Act.

²² See 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

²³ See, e.g., *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling, 23 FCC Rcd 559, 565, para. 10 (2008) (concluding that “[s]hould a question arise as to whether express consent was provided, the burden will be on [the caller] to show it obtained the necessary prior express consent.”).

and reminders for parties and other gatherings, order confirmations, and emergency notifications. The Commission has noted that consumers typically want to receive the information conveyed in such calls.²⁴ Other prerecorded message calls Phonevite made in November 2012, however, contained messages seeking a vote for a political candidate or endorsing a political candidate for office. Of the latter such calls, nothing in the documents or information provided by the Company in response to the LOI indicated that these calls were made for an emergency purpose.²⁵ In addition, the Company did not provide evidence of prior express consent for any of the calls it made on behalf of any of its clients.

9. TCD staff compared lists of the thousands of phone numbers to which the Company made prerecorded calls seeking a vote for a political candidate or endorsing a political candidate for office²⁶ to an industry-standard, commercially available database of known assigned and ported wireless numbers.²⁷ TCD staff determined that the Company made 3,542 such calls to cell phones in November 2012, in violation of Section 227(b)(1)(A)(iii) of the Act and Section 64.1200(a)(1)(iii) of the rules.²⁸

10. Independently, TCD staff randomly chose 10 cell phone numbers to which Phonevite made a call with a prerecorded voice message seeking a vote for a political candidate or endorsing a political candidate for office in November of 2012 and spoke with the call recipient. A chart of the identified cell phone numbers and the dates and times that Phonevite made these calls to the recipients is included in the Appendix to this Citation. Without exception, each recipient denied giving anyone permission to make such calls to their respective cell phones at any time.²⁹ This further shows that Phonevite did not have the prior express consent of these called parties to make such calls to their mobile phones.

11. Based on the record developed in this case, the Enforcement Bureau, acting through its delegated authority, finds that Ifonoclast, Inc., d/b/a Phonevite, made one or more calls with prerecorded voice messages in violation of Section 227(b)(1)(A)(iii) of the Act and Section 64.1200(a)(1)(iii) of the Rules.³⁰

IV. OPPORTUNITY TO RESPOND TO THIS CITATION

12. Phonevite may respond to this Citation within thirty (30) calendar days from the release date of this Citation by any of the following methods: (1) a written statement, (2) a teleconference interview, or (3) a personal interview at the Commission Field Office nearest to Phonevite's place of business. The Commission Field Office nearest Phonevite is located in San Francisco, California.

²⁴ See *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, 27 FCC Rcd 1830, 1838, para. 21 (2012) (noting that calls such as those concerning bank account balances, credit card fraud alerts, package deliveries, and school closings provide information desired by consumers).

²⁵ See 47 C.F.R. § 64.1200(f)(4) (stating that “emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.”).

²⁶ It appears that Phonevite makes calls using automatic telephone dialing systems. See Phonevite Website, Help Center, <https://www.phonevite.com/help/faq/?sid=1029> (stating that “Premium Users can send up to 30,000 calls per Phonevite broadcast and there is no limit on how many broadcasts you can send.”) (last visited Apr. 2, 2015).

²⁷ See Interactive Marketing Solutions, Inc., Website, Homepage, <https://www.ims-dm.com/mvc/index.php> (last visited Apr. 2, 2015). Interactive Marketing Solutions, Inc., is a member of the Direct Marketing Association and bills itself as “the country’s largest single-source supplier” of data identifying telephone numbers that have been assigned or ported to wireless devices, “to help businesses comply with state and federal legislation.” *Id.*

²⁸ By making prerecorded message calls on behalf of itself or third parties (its clients), Phonevite necessarily “initiates” calls for the purposes of Section 64.1200 of the FCC’s rules. See *Dialing Services*, 29 FCC Rcd at 5542–5545, paras. 13–18.

²⁹ See Affidavit of Brenda Boykin, Attorney Advisor, Telecommunications Consumers Division, FCC Enforcement Bureau (Nov. 13, 2013) (on file in EB-TCD-12-00002528).

³⁰ 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

7. If Phonevite requests a teleconference or personal interview, contact Kristi Thompson at (202) 418-1318. We note that such teleconference or interview must take place within 30 calendar days of the release date of this Citation. If Phonevite prefers to submit a written response with supporting documentation, it must send the response within thirty (30) calendar days of the release date of this Citation to the contact and address provided in the paragraph below.

8. All written communications should be sent to the address below.

Kristi Thompson
Deputy Division Chief, EB-TCD
Room 4-C220
Federal Communications Commission
445 12th St SW, Washington DC 20554
Re: EB-TCD-12-00002528

9. Upon request, the Commission will make reasonable accommodations for persons with disabilities. If applicable, Phonevite should provide a description of the accommodation required, and include as much detail as possible, and also provide a telephone number and other contact information. Phonevite should allow at least five business days advance notice; last minute requests will be accepted, but may be impossible to fill. Phonevite should send an e-mail to fcc504@fcc.gov or call the FCC's Consumer & Governmental Affairs Bureau:

For sign language interpreters, CART, and other reasonable accommodations:
202-418-0530 (voice), 202-418-0432 (tty);

For accessible format materials (braille, large print, electronic files, and audio format):
202-418-0531 (voice), 202-418-7365 (tty).

10. We advise Phonevite that it is a violation of Section 1.17 of the Rules³¹ for any person to make any false or misleading written or oral statement of fact to the Commission. Specifically, no person shall:

(1) In any written or oral statement of fact, intentionally provide material factual information that is incorrect or intentionally omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading; and

(2) In any written statement of fact, provide material factual information that is incorrect or omit material information that is necessary to prevent any material factual statement that is made from being incorrect or misleading without a reasonable basis for believing that any such material factual statement is correct and not misleading.³²

11. Further, the knowing and willful making of any false statement, or the concealment of any material fact, in reply to this Citation is punishable by fine or imprisonment.³³

12. Violations of Section 1.17 of the Rules or the criminal statute referenced above may result in further legal action, including monetary forfeitures pursuant to Section 503 of the Act.

13. Finally, we warn Phonevite that, under the Privacy Act of 1974,³⁴ Commission staff will use all relevant material information before it, including information disclosed in interviews or written

³¹ 47 C.F.R. § 1.17.

³² 47 C.F.R. § 1.17(a)(1)–(2).

³³ 18 U.S.C. § 1001.

statements, to determine what, if any, enforcement action is required to ensure Phonevite's compliance with the Act and Rules.

V. FUTURE VIOLATIONS

14. If, after receipt of this Citation, Phonevite again violates Section 227 of the Act or Section 64.1200 of the Rules by engaging in conduct of the type described herein, the Commission may impose sanctions for each such violation. For example, the Commission may impose monetary forfeitures. The Commission may impose forfeitures not to exceed \$16,000 for each such violation or each day of a continuing violation, and up to \$112,500 for any single act or failure to act.³⁵ The Commission may further adjust the forfeiture reflecting enumerated statutory factors, which include the nature, circumstances, extent, and gravity of the violation, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.³⁶ Further, as discussed above, the Commission may assess forfeitures on both the conduct that led to this Citation and the conduct following it.³⁷

VI. ORDERING CLAUSES

15. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i) and 4(j) of the Act,³⁸ Ifonoclast, Inc., must cease and desist from making autodialed or prerecorded or artificial voice message calls to wireless phones unless such calls are made (1) for an emergency purpose, or (2) with the prior express consent of the called party, in accordance with Section 227(b)(1)(A)(iii) of the Act and Section 64.1200(a)(1)(iii) of the Rules.³⁹

16. **IT IS FURTHER ORDERED** that a copy of this Citation and Order shall be sent by first class mail and certified mail, return receipt requested, to Ifonoclast, Inc., d/b/a Phonevite, Attn: John Nahm, Chief Executive Officer, 4620 Fortran Drive, Suite 207, San Jose, California 95134; and to William E. Raney, Esq., Copilevitz & Canter, LLC, 310 W. 20th Street, Suite 300, Kansas City, MO 64108.

FEDERAL COMMUNICATIONS COMMISSION

Richard A. Hindman
Division Chief

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³⁴ 5 U.S.C. § 552a(e)(3).

³⁵ See 47 U.S.C. § 503; 47 C.F.R. § 1.80(b). This amount is subject to further adjustment for inflation. See 47 C.F.R. § 1.80(b)(9)).

³⁶ See 47 U.S.C. § 503(b)(2)(E); 47 C.F.R. § 1.80(b)(8).

³⁷ See *supra* paragraph 2.

³⁸ 47 U.S.C. §§ 154(i), 154(j).

³⁹ 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii).

Appendix

Ifonoclast, Inc. d/b/a Phonevite

Prerecorded message calls made to wireless telephones without subscriber consent⁴⁰

Date and Time of Call ⁴¹	Wireless Phone Number Dialed	Prerecorded Message
11/2/2012 10:00	203 [REDACTED]	2012-11-01/13518044571927389928.mp3
11/6/2012 8:00	201 [REDACTED]	2012-11-06/13522166911526875036.mp3
11/5/2012 4:00	225 [REDACTED]	2012-11-04/13520838171568430580.mp3
11/5/2012 6:15	225 [REDACTED]	2012-11-05/13521608682075540488.mp3
11/5/2012 6:15	225 [REDACTED]	2012-11-05/13521608682075540488.mp3
11/5/2012 6:15	225 [REDACTED]	2012-11-05/13521608682075540488.mp3
11/5/2012 6:15	225 [REDACTED]	2012-11-05/13521608682075540488.mp3
11/5/2012 6:15	225 [REDACTED]	2012-11-05/13521608682075540488.mp3
11/5/2012 6:15	225 [REDACTED]	2012-11-05/13521608682075540488.mp3
11/5/2012 4:00	225 [REDACTED]	2012-11-04/13520838171568430580.mp3

⁴⁰ See Affidavit of Brenda Boykin, Attorney Advisor, Telecommunications Consumers Division, FCC Enforcement Bureau (Nov. 13, 2013) (on file in EB-TCD-12-00002528).

⁴¹ See June 30 Response, Excel spreadsheet attachment, "[REDACTED].csv." The information listed in this Appendix appears on the call detail records produced by Phonevite in response to the Bureau's February 8, 2013 LOI.